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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE TESLA, INC. SECURITIES LITIGATION

Case No. 3:18-cv-04865-EMC

**PLAINTIFF'S SUBMISSION OF SECOND
REVISED PROPOSED VERDICT FORM**

Plaintiff submits the attached Second Revised Proposed Verdict Form to resolve the dispute that has arisen over the appropriate use of “actual” market data in the context of calculating option damages. Plaintiff’s initial proposed verdict form had included Question B.2. (*i.e.*, requiring the jury to determine “but for” implied volatility percentages for use with the Black-Scholes-Merton model when calculating option damages). ECF No. 476-1. Following the Court’s Final Pretrial Conference Order (ECF No. 508), Plaintiff submitted a revised proposed verdict form omitting Question B.2. given the parties’ apparent readiness to use “actual” market data where available in order to limit and/or simplify the issues for trial. ECF No. 513-1. Defendants then objected to the removal of Question B.2. and insisted that the jury be required to provide “but for” implied volatility data. Defendants also argued Plaintiff’s reliance on “actual” market data for both the “but for” and “actual” curves constituted a material change in his damages theory that warranted supplemental discovery and additional questions on the verdict form. Given Defendants’ objection and arguments, Plaintiff now submits the attached Second Revised Proposed Verdict Form that reincorporates Question B.2. and eliminates Defendants’ need for supplemental expert discovery and additional questions on the verdict form.

1 I. Plaintiff's Second Revised Proposed Verdict Form Comports with the Court's
 2 Final Pretrial Conference Order.

3 Defendants had previously argued in motion *in limine* briefing and during the final pretrial
 4 conference that Plaintiff should use "actual" market data (including actual implied volatilities)
 5 when calculating option damages. *See, e.g.*, 10/25/2022 Tr. at 55:15-55:20. In response to this
 6 argument and the Court's guidance during the final pretrial conference, Plaintiff recognized that
 7 using "actual" market data would simplify issues for the jury and potentially avoid unnecessary
 8 complication when addressing options. By relying on "actual" implied volatility data for both the
 9 "actual" and "but for" curves, the only input needed from the jury would have been the "but for"
 10 stock price. Thus, a reasonable estimate of damages for options would have been possible without
 11 needing the jury to decide potentially complicated issues pertaining to implied volatility.
 12 Notwithstanding, Defendants objected to this approach in support of using "actual" market data
 13 for constructing the "actual" curve only, thereby requiring the jury to determine implied volatility
 14 percentages for the "but for" curve. Plaintiff agrees to follow this approach and, pursuant to the
 15 Court's order dated December 22, 2022, will provide updated calculations from Professor Steven
 16 Heston as well as make Professor Heston available for a 1 hour deposition to address them.¹

17 Attached hereto as Exhibit A is Plaintiff's Second Revised Proposed Verdict Form which
 18 reincorporates Question B.2. from the initial verdict form. Question B.2. requires the jury to
 19 determine "but for" implied volatility percentages. With this revision, Plaintiff believes that there
 20 is no need for supplemental expert discovery (let alone any legitimate reason for delaying the
 21 trial).

22 II. Defendants' Amended Verdict Form Includes Special Interrogatories that Are
 23 Unnecessary, Confusing, and Prejudicial.

24 Defendants improperly include specific interrogatories and/or requests for special verdicts
 25 in their revised verdict form. These interrogatories appear in Section B (Questions 3 and 4) (ECF
 26 No. 511-1, p. 5) and require the jury to decide whether Plaintiff has "proven" that "implied

28 ¹ Plaintiff continues to explore with Defendants ways to simplify the presentation of the questions
 regarding option damages to the jury.

1 volatilities for each Tesla stock option during each day of the Class Period, as reported by the
 2 CBOE, would have been the same but for Tweet 1 and/or Tweet 2” and “proven” that “movements
 3 in prices of a January 2020 at-the-money-straddle . . . can be reliably used to measure the changes
 4 in the direct effect of Tweet 1 and/or Tweet 2.” ECF No. 511 at 2, 511-1 at 5. These questions are
 5 unnecessary and confusing, given that Plaintiff’s Second Revised Proposed Verdict Form tasks
 6 the jury with deciding the implied volatility percentages for the “but for” curve. Thus, including
 7 these interrogatories would be improper. *See Galdamez v. Potter*, 415 F.3d 1015, 1026 n.9 (9th
 8 Cir. 2005) (refusing to use a special verdict form where it “is unlikely to be illuminating, and in
 9 many cases may mislead or confuse the jury or otherwise lead to error.”); *Santos v. Posadas De*
 10 *P.R. Assocs.*, 452 F.3d 59, 65 (1st Cir. 2006) (refusing to use a special verdict form that was “too
 11 complicated,” noting that “Less is sometimes more.”); *MKB Constructors v. Am. Zurich Ins. Co.*,
 12 No. C13-0611JLR, 2015 U.S. Dist. LEXIS 32169, at *83-84 (W.D. Wash. Mar. 14, 2015) (no
 13 error where the court refused to adopt a “elaborate, confusing, and slanted special verdict form in
 14 favor a simpler form for the jury.”); *United States v. Yagi*, No. CR-12-0483 EMC, 2013 U.S. Dist.
 15 LEXIS 153704, at *2 (N.D. Cal. Oct. 25, 2013) (rejecting special verdict form where it is
 16 “unnecessary under the law and potentially confusing to the jury.”).

17 Plaintiff’s Second Revised Proposed Verdict Form makes clear that Plaintiff is *not*
 18 changing his damages theory. Thus, the inclusion of these special verdicts and/or interrogatories
 19 is unnecessary. In particular, Defendants’ verdict includes the question: “[h]as Plaintiff proven
 20 that the movements in prices of a January 2020 at-the-money-straddle during the Class Period can
 21 be reliably used to measure the changes in the direct effect of Tweet 1 and/or Tweet 2?”
 22 Defendants’ claim that this question is aimed at a purported “new theory” is disingenuous as
 23 nothing has changed concerning either Professor Heston’s opinions on at-the-money-forward
 24 straddles are impacted (excepting in the impact quantum) or Dr. Hartzmark’s opinions concerning
 25 his calculations of the direct effects on Tesla stock based on the implied volatilities calculated
 26 from the January 2020 at-the-money-forward straddle. Defendants fail to explain why this
 27 question was not included in their initial proposed verdict form. In any event, having the jury
 28 determine the “but for” implied volatility percentages renders Defendants’ question unnecessary.

1 Jury verdict forms in securities fraud cases require juries to decide only whether or not the
 2 plaintiff has proven his damages; they do not require specific findings from the juries regarding
 3 assumptions and/or calculations upon which the damages theories are based. For example, in *Jaffe*
 4 v. *Household International*, the jury was asked simply to decide whether the plaintiff's damages
 5 model "reasonably estimate[d]" the damages. *See* ECF No. 476-2, p. 41. Likewise, in *In re*
 6 *Vivendi Universal S.A. Securities Litigation*, the jury was asked, first, to decide only whether the
 7 plaintiff had "proven" the elements of his Section 10(b) claim and then, second, to specify the
 8 amount of inflation "caused" by the Section 10(b) violations on each day of the Class Period. *See*
 9 ECF No. 476-3 at 58. Plaintiff's expert, Dr. Hartzmark, will explain his calculation of the amount
 10 of stock, option, and bond price inflation/deflation at trial. The jury will either find his testimony
 11 credible or not and, in turn, decide whether Plaintiff has "proven" his damages. There is no need
 12 to have the jury make specific findings with respect to the individual components and assumptions
 13 underlying Dr. Hartzmark's methodology, especially when doing so could lead the jury to return
 14 an inconsistent verdict and potentially necessitate a new trial. *See Asfall v. L.A. Unified Sch. Dist.*,
 15 Nos. 20-55599, 20-56259, 2022 U.S. App. LEXIS 19669, at *3 (9th Cir. July 15, 2022) ("when
 16 the jury's answers to interrogatories are inconsistent with the verdict, the district court may order
 17 a new trial"). For example, if the jury disagrees with one component of Dr. Hartzmark's
 18 methodology but finds overall that Plaintiff has "proven" his damages, that inconsistency would
 19 potentially be exploited to evade an unfavorable verdict and force a new trial.

20 Defendants' amended verdict form also includes new questions that are unrelated to
 21 Plaintiff's option damages. These questions are within Section A (Question 8) and Section B
 22 (Question 2) and both address the issue of when the "fraud" was "corrected" in the market, i.e.,
 23 when the "truth" was revealed. Question 8 in Section A asks the jury to specify the "date" on
 24 which the "market learn[ed] the truth about the information that was alleged misstated" while
 25 Question 2 in Section B asks the jury to specify the "date" when "the market price of Tesla stock
 26 return[ed] to the level it would have been trading at absent any material misstatements." ECF No.
 27 511-1 at 3, 4. These questions are unnecessary given that the jury will already be deciding how
 28 much artificial inflation existed on each day during the Class Period, as the Court indicated during

1 the final pretrial conference hearing. *See* Tr. 10/25/22 at 140:2-140:8 (Court: “to the extent that
 2 the proposed verdict from the plaintiff has an already table to be prepared and you just have to
 3 check a box to say yes, I don’t look too favorably on that”).² Further, presenting the jury with
 4 these two questions creates a risk that the jury will answer the questions in conflicting ways and,
 5 in turn, return an inconsistent verdict after the trial. The attempt to include these questions on the
 6 verdict form should be rejected.

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8 Dated: December 22, 2022

Respectfully submitted,

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s/ Adam M. Apton

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² Plaintiffs adhered to the Court’s directives in this regard and eliminated the table from their revised verdict form. *See* ECF No. 513-1, pp. 3-4. Defendants’ amended verdict form continues to have a table with values already included and seeks to have the jury make an “all-or-nothing” determination, which runs contrary to law on this issue. *See, e.g., Gruber v. Gilbertson*, 2022 WL 4232834, at *3 (S.D.N.Y., 2022) (“consistent with plaintiffs’ conventional loss causation theory, the damages instruction made clear that the jury could select a middle ground between these all-or-nothing approaches, stating that, as to damages, ‘you must determine whether the amount of fraudulent inflation is 100%, as the plaintiff contends; 0%, as Reger contends; or some number in-between.’”); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 575 (S.D.N.Y. 2011) (rejecting defendants’ position that “the expert testimony on damages was ‘all or nothing,’ in the sense that the jury had to either accept or reject Dr. Nye or Dr. Silber’s analyses wholesale.”); *see also Harmsen v. Smith*, 693 F.2d 932, 945 (9th Cir. 1982) (“[d]amages need not be proved to a mathematical certainty” and all that is required is that “sufficient facts must be introduced so that a court can arrive at an intelligent estimate without speculation or conjecture.”). While Plaintiff does not oppose the presentation of a table including the values identified by Plaintiff’s expert as part of the jury verdict form, and included such a table in its initial verdict form, any such table must also provide the jury with the option to select alternative values if it so chooses.

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